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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES LEROY MOSES, SR., Defendant and Appellant.	F055132 (Super. Ct. No. F06908264) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Levis, Judge.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On January 14, 2008, the Fresno County District Attorney filed a first amended information in superior court charging appellant as follows:

--Counts 1 and 2--lewd act upon a child (Pen. Code[1], § 288, subd. (a)), a serious felony (§ 1192.7, subd. (c));

--Counts 3 and 4--forcible lewd act upon a child (§ 288, subd. (b)(1)), a serious felony (§ 1192.7, subd. (c)).

As to counts 1 through 4, the district attorney specially alleged appellant had sustained prior convictions (§§ 667.71, 667.61, subd. (d)(1)). The district attorney further alleged appellant had sustained prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a prior serious felony conviction (§ 667, subd. (a)(1)).

On January 15, 2008, appellant was arraigned, pleaded not guilty to the substantive counts, and denied the special allegations. Jury selection commenced the following day.

On January 22, 2008, the prosecution rested and the court denied appellant's motion for acquittal (§ 1118.1).

On January 24, 2008, the jury returned verdicts finding appellant guilty of counts 3 and 4. On the same date, the court bifurcated trial of the special allegations.

On January 31, 2008, the court, sitting without a jury, conducted the bifurcated proceeding and found the special allegations to be true.

On April 7, 2008, the court denied appellant probation and sentenced him to a term of 75 years to life on count 3 and a concurrent term of 75 years to life on count 4. The court imposed a consecutive term of 10 years for appellant's prior felony conviction (§ 667, subd. (a)(1)).

On April 10, 2008, appellant filed a timely notice of appeal.

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1 All further statutory references are to the penal code unless otherwise indicated.

STATEMENT OF FACTS

Trial Testimony

In autumn 2006, appellant resided at the King's Court Apartments with his girlfriend, Joy. In September 2006, Joy's daughter Stella, granddaughter "I," and two other grandchildren were also residing in the same complex. They stayed with Stella's father in another unit. Stella's father moved out of his apartment and the police later evicted Stella and her three children from the unit. Stella's husband was in prison and she had no place to live. As a result, she and the three children moved in with appellant and Joy. They moved in with the understanding they would only stay for a short time. The governing regulations of the King's Court Apartment provided that a guest (someone not listed on the lease) could only stay in an apartment for five days in a calendar month. Appellant and Joy were the only people listed on the lease for their unit. After Stella and her three children exceeded five days of residency in that unit, the manager or owner of the complex asked them to leave.

Stella generally worked from 9:00 p.m. until 2:00 a.m. One evening when Stella was not at work, "I" told her that appellant had touched her a couple times "down there" with his fingers. Stella questioned "I" about the difference between the truth and a lie and told her it was inappropriate to say something false. Stella had previously spoken to "I" about inappropriate touching and "I" maintained she was telling the truth.

After "I" told Stella about the touching, Stella called her cousin and asked if she and her children could stay with her. Stella explained she wanted to get out of appellant and her mother's apartment as soon as possible. She then asked appellant for a ride to her cousin's house because she did not have a vehicle. Stella did not speak to appellant about what "I" had told her. Several days later, Stella took "I" to the hospital.

On September 23, 2006, Fresno Police Officer Derek Scott interviewed "I" at University Medical Center. "I" was unresponsive and shy when Officer Scott tried to speak with her alone. Scott then had Stella join them for the interview. "I" sat on

Stella's lap, but faced away from Stella, and Scott advised Stella not to interact with her daughter. In response to questioning, "I" told Scott the appellant had touched her "down there," referring to her vaginal area. "I" indicated that appellant touched her on top of and inside her underwear. She told Scott she had informed Joy about the incident after it took place. Joy later denied that "I" had ever told her about inappropriate touching by appellant. Scott said the interview lasted about one hour and "I's" statements to him were consistent.

Fresno Police Detective Robert Holguin, a member of the sexual assault unit, said he was assigned to the case on September 25, 2006. He made contact with Stella on October 19, 2006, and arranged for a forensic interview with "I." In such an interview, a forensic interviewer questions a minor victim while law enforcement, prosecutorial, and Child Protective Services personnel observe the questioning on a monitor in another room. Shelly Ramirez served as forensic interviewer in "I's" case. The interview took place on October 24, 2006. During the interview, the forensic interviewer presented "I" with drawings of the human body. "I" used a crayon and noted the areas where she had been touched. "I" indicated "[b]utt" and "pee pee" on the diagrams. Holguin also testified that a sexual assault examination was conducted in "I's" case. After Ramirez completed the questioning, Detective Holguin went back to the room and presented "I" with a photograph lineup containing six pictures. "I" identified appellant as the person who molested her.

October 24, 2006, Interview of "I"

The court played a videotaped interview between "I" and Shelly Ramirez at the Fresno County Multi-disciplinary Interview Center (MDIC). The interview took place on October 24, 2006, and Fresno Police Detective Holdeen, Rick Thomas of the District Attorney's office, and Cora Rains of MDIC watched and heard the interview from another room as Ramirez conducted it. "I" told Ramirez that she had previously spoken with another officer who had asked her about appellant. "I" said she could no longer visit

her grandmother's apartment because "something bad happened." "I" said after she talked to the police, they were going to arrest appellant. When Ramirez asked what appellant had done, "I" said she did not know.

At a later point in the interview with Ramirez, "I" said appellant had done something bad to her. When Ramirez asked how many times this occurred, "I" said it happened one time. "I" explained the incident took place at appellant's apartment, when she was preparing to go to the doctor to get checked. "I" explained the "bad something" occurred in the room that appellant and her grandmother shared. "I" said she and her mother were checking her hair in that room when "I" told her mother what appellant had done. According to "I," Stella said she was going to stop him and she and "I" went to a medical facility. "I" was unable to explain exactly what appellant had done. Ramirez gave "I" a picture of a girl and asked "I" to indicate what appellant had done. "I" circled the vaginal area of the picture and referred to it as the body part used to "pee." "I" also said appellant played with that part of her body.

"I" also explained the incident took place in appellant and Joy's room while Joy was at bingo and Stella was at work. "I" said appellant touched her on the inside of her underwear when she was wearing a dress. "I" also said appellant touched her on her bottom. "I" denied that appellant touched her anywhere else on her body, that he asked her to touch him, or that he had showed her any part of his body. "I" denied that anyone had told her what to say to Ramirez.

Additional Trial Testimony

"I" testified at trial that she lived with her mother and siblings in the apartment of appellant and her grandmother. At certain times, "I's" mother went to work and her grandmother went to play bingo. She remembered appellant did something uncomfortable to her on one occasion when her mother and grandmother were away. However, she could not exactly remember what appellant did to her. "I" later said appellant touched her in a place covered by her pants or shorts. She said this happened

four or more times. She also said appellant did bad things and she got a "bad touch." "I" could not remember what part of appellant's body touched her or what she was wearing at the time and could not remember whether appellant touched her over or under her clothing. "I" remembered talking to a police officer at a medical facility but did not remember what she told the officer. "I" said she thought she told the officer the truth. "I" testified that Stella never told her what to tell the police.

After Holguin obtained information at the October 24 forensic interview, he and another detective went to the residence that appellant shared with Joy. That visit took place on October 25, 2006. Joy initially said this was the first time she had heard about molestation. However, Joy also said "I" had described some molestation to her and Joy later asked appellant if he had touched "I." Appellant denied any misconduct. Joy told Holguin that appellant was alone with "I" and the other children when she went to play bingo and Stella went to work. On that same visit, Holguin contacted appellant on the walkway in front of the residence, took appellant into custody, and escorted him to the street violence bureau interview rooms. Holguin recorded an interview with appellant on audiotape and videotape.

Although Holguin did not advise appellant that he was going to record their interview, he did say he was conducting an investigation about child molestation. Holguin specifically identified "I" as the alleged victim. Appellant agreed to talk to Holguin, said he did not have anything to hide, and waived his *Miranda*[2] rights after Holguin gave him the advisements. In response to Holguin's questions, appellant said he had prior convictions in Wichita, Kansas and Fresno. Appellant also said he had a son, grandson, and granddaughter who resided in the same apartment complex.[3] Appellant

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2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)

3 Holguin said Stella informed him that appellant had a granddaughter who was another potential victim. Holguin contacted the granddaughter's mother but never received any information and did not prepare a report with respect to that granddaughter.

said a similar situation had arisen in 1987, that he had learned his lesson at that time, and that he did not understand Holguin's inquiry. Appellant also said he was not going to accept responsibility for the alleged conduct and would fight the charge. He nevertheless said he would speak freely with Holguin.

Holguin said he had checked on appellant's status at the time of the interview and that appellant was currently registered as a sex offender. During the interview, appellant said he had lived in the complex since May 2002 and had been a handyman at the complex prior to sustaining a disability. Appellant said Stella and her children began living in his apartment because Stella's biological father had kicked them out of his house. According to appellant, the apartment manager said Stella and her children had to be out of appellant's apartment after seven days. Appellant said he let them live there for 10 days and then advised Stella they could no longer live there. According to appellant, the allegations of molestation started on the day he kicked Stella and the children out of the apartment he shared with Joy.

During the course of the interview, appellant said he had nothing to hide, that Stella had taken some things from his apartment when he was out-of-state for an unspecified week, and that he would not touch a kid. Holguin asked whether law enforcement had obtained a DNA sample from him when he registered as a sex offender and appellant said that it had. Holguin advised appellant that a physician had conducted a sexual assault examination of "I." Holguin also said "I" had been checked for DNA and asked whether there was any reason why authorities would find his DNA on the underwear of "I." Holguin acknowledged there was no DNA evidence linking appellant to the alleged molestation and said appellant continued to deny any misconduct.

Holguin told appellant the police had conducted an extensive investigation, had "I" checked at the hospital, and that everything showed that appellant had touched "I." Holguin told appellant it was time from appellant to be honest with him but appellant continued to deny any misconduct. Holguin again told appellant it was time to be honest

about what happened and that his answers would determine how things were going to go down. Holguin told appellant he was giving him a chance to explain what happened. Appellant then said there were only a couple of times that something could have happened. When "I" first came to his apartment, she and appellant were in the bedroom and she was not wearing any underwear. He went to a drawer and gave her a clean pair of underwear. Appellant said nothing happened on this occasion but Holguin told him there was more to the incident. Holguin advised appellant to be honest with him because "I" had accused him of sticking his finger inside her vagina and anus. Appellant eventually said the only time he could have touched "I" was when he pulled her pants up.

During their exchange, Holguin advised appellant he would get him help if he needed help. Holguin said his office could not help appellant unless the latter were honest about what had happened. Holguin told appellant that he knew, for a fact, that appellant had touched "I's" vaginal area. Holguin testified he had no evidence of touching other than the statement of "I." At that point, appellant said "to hell with it" and admitted touching her on two occasions. Appellant advised he touched "I" once on the couch over her underwear and once in the bedroom while she was standing up next to him. Appellant also said the touching may have happened, that he did not know, and that he was not saying it did not happen. Elsewhere in the interview, appellant specifically denied sticking his finger in "I's" anus and said he loved the children and would not do anything to hurt them. Holguin acknowledged the sexual assault examination of "I" yielded no findings.

Defense

Michelle Lindsay testified she was the resident manager for the King's Court Apartments on North Sixth Street in Fresno. Lindsay said she knew appellant as a resident of the King's Court complex. She also knew appellant as a one-time employee of the complex and said they were friends prior to his employment at the complex. In September 2006, Stella lived with her father in one apartment at the complex and then

moved in with her mother, Joy, and appellant in their apartment. Lindsay explained King's Court policy permitted a lessee to have a resident guest for only five days per month. When Lindsay learned that Stella and her children had gone beyond the five days, Lindsay informed her supervisor. The supervisor then asked Stella to leave the apartment of Joy and appellant.

Nasser Pol testified he was the owner of the King's Court Apartments and knew appellant as his maintenance worker and tenant. Pol said Stella lived at the complex with her father until he moved out. She then moved into the apartment of Joy and appellant. Stella exceeded the five-day limit for guests of leasehold tenants and stayed with Joy and appellant for a month and a half. Pol then asked appellant to get her out his apartment. Pol said Stella eventually left the complex.

David Lindsay, ex-husband of Michelle Lindsay, said he knew appellant and used to work with him at the King's Court Apartments. Appellant said he saw Stella argue with appellant on two occasions. At one point, David Lindsay heard Stella call appellant a "son of a bitch" and say that she was going to get back at him. The court admitted the statements to show Stella's state of mind. David also said he and Michelle were legally separated, that appellant and Michelle were friends, and that Michelle and their daughter spent the night in appellant's apartment on one occasion. David acknowledged that he had selective memory and suffered from long-term memory loss.

DISCUSSION

I. WAS APPELLANT'S CONFESSION THE PRODUCT OF IMPLIED PROMISES OF LENIENCY OR THREATS OF A WORSE RESULT?

Appellant contends the trial court should have excluded his confession to Detective Holguin because it was the product of implied promises of leniency and threats of worse consequences if he did not confess.

The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. The federal Constitution requires the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. The same is now true under California law as a result of Proposition 8, a 1982 voter initiative. Under both state and federal law, courts apply a totality of circumstances test to determine the voluntariness of a confession. Among the factors to be considered are: the crucial element of police coercion; the length of the interrogation; its location; its continuity; and the defendant's maturity, education, physical condition, and mental health. On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. The trial court's finding as to the voluntariness of the confession is subject to independent review. In determining whether a confession was voluntary, the question is whether defendant's choice to confess was not essentially free because his will was overborne. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) This is essentially a factual inquiry. (*People v. Memro* (1995) 11 Cal.4th 786, 827.) In reviewing the trial court's determinations of voluntariness, an appellate court accepts the trial court's factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided those findings are supported by substantial evidence. (*People v. Jablonski* (2006) 37 Cal.4th 774, 814.)

In the instant case, Detective Holguin conducted a recorded interview with appellant in a "small room" on October 9, 2007. Holguin read appellant his rights under *Miranda* and appellant agreed to speak him, noting, "Yeah, I don't have nothing to hide." After describing his age, residence and marital status, schooling, military service, and employment and health status, appellant told Holguin he had been arrested "[f]or the same damn thing back in '87." Appellant told Holguin he was "talking freely" and claimed Stella "didn't start this crap until the day after I throwed her out of the house." Appellant said the owner and manager of the apartment complex allowed Stella and her

children to stay with Joy and him for seven days. Appellant said they actually stayed 10 days and then he had to force them out on a Sunday evening.

Appellant described the circumstances of his Kansas offenses, noting he was incarcerated from 1992 to 2002. He said the Kansas charge was "trumped up" but the victims were step-nieces of his third wife. Appellant said he was in bad health and was taking medication to deal with scar tissue following colon surgery. Appellant said he did not use drugs or alcohol but had taken his medication before the officers came to see him at the apartment complex. Appellant said the medication made him feel "[k]ind of light headed, but I'm okay." Appellant maintained he was being interviewed because of Stella's reaction after he and Joy "kicked her out of the house."

Appellant said he was not going back to prison, that he would fight any charges, and that he had nothing to hide. Detective Holguin advised, "[I]f something happened it's better for you to tell me right now what's going on so that we can get this taken care of." According to appellant, Stella said "I" indicated that appellant had done something but appellant denied any misconduct. Appellant said he had registered under section 290, had not done anything wrong, and had been around kids at the apartment complex "the whole time." When Holguin asked who might have done something to "I," the appellant accused "[t]he guys that she had in her apartment when she was drunker than a skunk coming home from work." Appellant said he and Joy normally resided alone and, other than Stella, there was no one in the household who could say for certain that he did not touch "I." When Holguin asked whether appellant ever seriously thought about touching a child, appellant responded, "No, I won't touch a kid I'm telling you that right now. I will not touch a kid. I got two grandkids over there in the same complex." Appellant claimed the accusation was either trumped up or Stella's doing.

In response to Holguin's questions, appellant said he gave a DNA sample when he registered under section 290 in California. He said he gave the sample at a place on First Street and it should still be on file. Holguin advised appellant that "I" went to a doctor

and received a sexual assault exam. Holguin asked, "Now would there be any reason why they would find your DNA on her underwear?" Appellant said it was possible because Stella and her children dressed in his bedroom and bathroom. When Holguin asked whether there was any reason why they should find his DNA on "I's" vagina, appellant said, "[N]o, shouldn't be."

After a pause in the interview, Holguin said the police conducted an extensive interview, had "I" checked at the hospital, and the police investigation showed that he had touched her. Holguin said it was time for appellant to be honest with him. After first responding, "No, no ...," appellant said, "The only time that I, it could have even happened there was a time that, you know, when she was in the bedroom and I'd give her clothes to put on; other than that no because I didn't, I didn't do anything." Appellant explained on one occasion "I" did not have any underwear and appellant got a clean pair of underwear from a drawer and she went to the bathroom and put on the undergarment. Appellant said "I's" brother was sitting on the bed when this took place.

When appellant said nothing happened, Holguin said there was more to the story because "I" was accusing him of sticking his finger inside her vagina and anus. Holguin advised appellant to be honest and say what really happened. Appellant denied any penetration and said the only time he might have touched her occurred one night when he helped her put on a pair of tight pants over her panties. Appellant said he could not think of any other time that he touched "I." Holguin again advised appellant to be honest and said, "If you need help, we need to get you help." Holguin also said, "I know for a fact our, our investigation clearly shows that you touched her vaginal area." Appellant replied, "How can you, now, okay, fine." Appellant then acknowledged, "Okay fine, I'm not going to deny it, fine, to hell with it. Be honest here.... I'm not going to deny it I'll be honest."

Detective Holguin made a number of statements about loving "I" a lot, about getting confused as to what type of love to show a child, and about getting "a little carried

away." Appellant responded, "It's possible okay, it's possible, it's possible, okay." When Holguin asked whether appellant just touched or rubbed the exterior of her vagina, appellant said, "No, I didn't, that's the point I'm trying to tell you there, I never penetrated anything. If I touched it was maybe in the wrong intentions I'll put it that way." When Holguin asked appellant to explain the situation involved in the touching, appellant said "I" sat so close to him on the edge of the bed that he felt "smothered." Appellant also noted that Joy, the grandmother of "I," was present when "I" sat next to appellant. Appellant also said, "[Y]ou know I just I don't know it may have happened I'm not saying it didn't okay. I'm not saying it if you got conclusive evidence that's fine I don't care."

Holguin eventually told appellant that his investigation showed a touching occurred but that "they're saying it happened five times." Holguin explained, "I don't know if it happened five times." Appellant claimed there was no way it could have happened five times but did acknowledge it happened twice when they were seated on the edge of the bed. Appellant said, "I'm not denying that." He claimed he touched the exterior of "I's" vagina and this occurred once outside her underwear and once inside her underwear. He denied any anal touching. After a few more questions, appellant said one incident of touching occurred when they were seated on the edge of his bed and the other occurred when they were seated on a couch in the living room. Appellant said the incident in the bedroom involved a partial hug and appellant put his hand on the side between "I's" legs. He said it entailed the rubbing of the outside of her vagina and did not happen five times.

Appellant said he underwent counseling in Kansas for three years and it helped him for awhile. Appellant also said he did not try to hurt "I" and that he and Joy attempted "to be the proper parents to the kids as we could." Holguin told appellant the fact the touching occurred just twice rather than five times was better for appellant's situation. When appellant asked how soon he could see a judge, Holguin indicated a

period of 48 hours. When Holguin briefly left the room, appellant stated aloud: "He just screwed me right there."

On the afternoon of January 15, 2008, appellant moved in limine to exclude the statements to Detective Holguin on the ground they were coerced, that appellant was under the influence of medications, and that appellant spoke in response to Holguin's promises of help. After conducting an Evidence Code section 402 hearing and hearing the arguments of counsel, the court admitted the confession "under the totality of the circumstances in this case."

A confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. However, mere advice or exhortation by police that it would be better for the accused to tell the truth does not render a subsequent confession involuntary provided it is unaccompanied by either a threat or a promise. When the benefit pointed out by police is one which flows naturally from a truthful and honest course of conduct, the subsequent statement will not be considered involuntary. On the other hand, if the defendant reasonably expects more lenient treatment from the police, prosecution, or court in consideration of making the statement – even a truthful one – that motivation renders the statement involuntary and inadmissible. (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

Here, appellant was 53 years of age and had previously been arrested and convicted for similar offenses. Detective Holguin interviewed him during the middle of the afternoon of October 9, 2007. The interview lasted 20 to 30 minutes, Holguin was the only interviewing officer, and Holguin had no weapons on his person during the interview. Holguin never implied that appellant would avoid a penalty or receive a minimal penalty if he confessed. However, he did urge appellant to share the circumstances of what happened and to be honest because "[i]t determines how things go down by what you tell me." Holguin also said, "If you need help, we need to get you help, okay. Cause the only [way] we're going to be able to get you help is if you['re]

honest with and tell me what happened." Where, as here, the benefit pointed out by the police to a suspect is that which flows naturally from a truthful and honest course of conduct, the defendant's statement will not be considered involuntary. (*People v. Hill* (1967) 66 Cal.2d 536, 549.)[4]

II. DID THE TRIAL COURT ERRONEOUSLY PRECLUDE DEFENSE COUNSEL FROM CROSS-EXAMINING THE MINOR VICTIM ABOUT PRIOR FALSE CLAIMS OF MOLESTATION?

Appellant contends the trial court erroneously precluded his counsel from cross-examining Stella about whether she had made false claims of molestation in the past.

On January 14, 2008, appellant filed a motion in limine seeking permission to "explore the existence of prior allegations of sexual abuse as made by the mother of the complaining witness, Stella," against her step father. Appellant maintained Stella's prior allegations contributed to or resulted in the instant allegations of "I." At the January 15,

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[4] Appellant attempts to analogize the instant case to a number of reported decisions but they are factually distinguishable. (*People v. Flores* (1983) 144 Cal.App.3d 459, 464-472 [Interrogation of a homicide defendant by two detectives lasted more than one hour with occasional pauses and interruption of the questioning. Defendant broke down and gave an inculpatory version of events after repeated denials of any complicity or culpability in the victim's death, after the threat of a possible death penalty, after police assurance that his prior record of assaultive conduct was nothing to worry about, and after the implied promise that he might be released from custody until trial.]; *People v. Hogan* (1982) 31 Cal.3d 815, 834-843 [Police questioning of homicide defendant consisted of three evening interviews conducted on two consecutive days. Two police officers conducted each interview. Before each of the three recorded interviews, the officers had a conversation with defendant that was not recorded. In one of the unrecorded conversations, an interviewing officer suggested that police could help if there was a mental problem involved. Police secretly recorded a conversation between appellant and his wife prior to his third interview with police. In that conversation, defendant's wife said police claimed proof that defendant raped the murder victim. However, the police had no such proof.]; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1483-1487 [Employing a variation of the class "'Mutt and Jeff'" routine of police interrogation, officers questioned a homicide defendant for eight hours (including a pre-*Miranda* interrogation) using lies, accusations, exhaustion, isolation, and threats to overcome defendant's resistance.])

2008 hearing on the motion, appellant's counsel confirmed that he was seeking to cross-examine Stella with regard to prior incidents in her life that would, in the words of the trial court, "impact her objectivity and may have influenced her conversations with the victim and therefore the victim's testimony." The prosecutor maintained the prospective testimony should be excluded under Evidence Code section 352 because it was "going to be confusing and misleading the issues that are presented before this case, which is whether the daughter of Stella ... was molested by ... the defendant."

Citing *People v. Foss* (2007) 155 Cal.App.4th 113 (*Foss*), the trial court denied the motion, stating:

> "[T]he only question would be whether or not she had influenced the child as to the child's testimony. I will allow the testimony of the disagreement between the mother and the defendant as motivation for her to influence the child. I will not allow the testimony as to any prior false allegations of sexual misconduct based on this most recent case.
>
> "So what I am saying to you is certainly you can attack her credibility; you can, if you are able to, depending on the testimony, convey to the jury, depending on what the testimony is, that the mother wrongly influenced the victim. But it will not be based on any allegations that she previously made towards someone. It will be based on the facts of the instant case and the transaction which occurred at this point and you're alleging as a result of a disagreement or an argument that occurred just shortly prior to the events in question as alleged."

Appellant contends the trial court committed reversible error by precluding the proposed inquiry on cross-examination because there was evidence Stella may have harbored a feeling of retaliation against appellant and that she had coached "I." He maintains it was imperative that the jury receive an accurate impression of Stella's credibility.

The confrontation clauses of the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) That right is not absolute. (*People v. Cromer* (2001)

24 Cal.4th 889, 892.) The confrontation clause simply guarantees an opportunity for effective cross-examination; it does not assure a chance to cross-examine in whatever way or to whatever extent the defense might wish. The trial court may permissibly limit cross-examination as long as the cross-examiner has the opportunity to place the witness in his or her proper light and to put the weight of the witness's testimony and his or her credibility to a reasonable3 test that allows the finder of fact to fairly appraise it. The trial court may limit cross examination to prevent undue harassment, expenditure of time, or confusion of the issues. A trial court's exercise of discretion to exclude evidence does not infringe a defendant's federal constitutional right to confront the witnesses against him or her unless the prohibited cross-examination might reasonably have produced a significantly different impression of the witness's credibility. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1386.)

Generally speaking, the application of the ordinary rules of evidence does not impermissibly fringe on a defendant's right to present a defense. Moreover, a trial court's decision to admit or exclude evidence is reviewable for abuse of discretion. An abuse of discretion standard requires the reviewing court to uphold the exclusion of evidence unless the reviewing court finds the trial court acted arbitrarily, capriciously, or in a patently absurd manner and that the exclusion of the evidence resulted in a manifest miscarriage of justice. (*Foss, supra,* 155 Cal.App.4th at pp. 125, 130 (*Foss*).) A miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion it is reasonably probable a result more favorable to the appealing party would have been reached absent the error. (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1170.)

In *Foss,* the Third District Court of Appeal concluded a trial court in a child molestation case is not required to allow the defense to inquire into whether a witness involved in the reporting of the molestation had a morbid fear of sexual matters. The defense in *Foss* sought to establish by this questioning that the witness, an adult female,

had influenced the child to false report molestation on the part of the defendant. The Third District concluded the trial court did not abuse its discretion in preventing the defense from embarking on this line of questioning. In reaching this conclusion, the Third District held *People v. Scholl* (1964) 225 Cal.App.2d 558, 562-564, an earlier case mandating such questioning, reflected attitudes and assumptions about sexual crimes and evidence that have since been disproved and discarded. (*Foss, supra,* 155 Cal.App.4th at pp. 116, 124, 128-130.)

In the instant case, the trial court applied the rule of *Foss* but nevertheless allowed the defense to cross-examine and present evidence bearing upon Stella's credibility. The court allowed the defense to present evidence of possible fabrication by Stella. During his interview with Detective Holguin, appellant mentioned several times his belief that Stella had concocted the molestation allegation because he had kicked her out of his apartment. On cross-examination during the People's case-in-chief, defense counsel asked Stella whether she had told the appellant that she was "going to get him" after he required her to move out of the apartment. Defense witness David Lindsay testified he heard Stella and appellant argue about her moving out of the latter's apartment. Lindsay said he later heard Stella tell another person that she was going to get back at appellant. On cross-examination during the People's case-in-chief, Stella testified that appellant and her mother were not trying to kick her out of their apartment and that appellant never told her she had to move out of the apartment. During the defense case, however, both Michelle Lindsay and Nasser Pol said they advised appellant that Stella and her children had to leave the apartment he shared with Joy.

During closing argument, defense counsel referred to Shelly Ramirez's MDIC interview with "I." Counsel cited to the transcript of the recorded interview, noted that Ramirez had asked "I" what appellant had done, and "I" responded by saying, "'My Mom didn't tell me yet.'" Counsel argued that "I" was a victim of her mother, i.e., Stella, because Stella had told "I" a story about molestation and "I" believed that story.

Counsel also argued that Stella did not take immediate action after learning of the alleged molestation but waited several days, thus implying that Stella acted out of a sense of retaliation against appellant for sending her away from the apartment rather than out of a sense of concern for her young daughter. Counsel also argued that "Stella told ["I"] what to say because she was upset that she was getting kicked out of the apartment."

Defense counsel vigorously addressed Stella's credibility through his meticulous examination of various prosecution and defense witnesses as well as his carefully crafted closing argument. In our view, it is not reasonably probable a result more favorable to appellant would have occurred had defense counsel been allowed to cross-examine Stella about alleged claims of molestation against her stepfather.

III. DID THE TRIAL COURT ERRONEOUSLY REDACT APPELLANT'S TAPE-RECORDED INTERVIEW WITH POLICE?

Appellant contends the trial court committed reversible error by redacting his tape-recorded interview with police to remove his explanation as to why Stella and "I" were accusing him of molestation.

On January 15, 2008, the prosecutor moved to redact a statement from the transcript of the interview between Detective Holguin and appellant. Appellant initially told Holguin that Stella "didn't start this crap until the day after I throwed her out of the house." He also said Stella's "old man" was due to get out of prison in November and that Stella had been working at a Mexican bar on Belmont and Valentine Avenues. Appellant then told Holguin: "She's been prostituting out of there she's been druggin', dealing drugs over there in the complex I mean there's all kinds of shit going on. She has men in and out of that house I mean." The prosecutor sought to remove the last quoted statement because it constituted "unsubstantiated accusations with no basis for the sole purpose of making the confidential victim's mother look bad. It's not evidence of any

prior bad acts to impeach her because it's her statement there is no surrounding instances of when these things occurred."

The court questioned the relevance of the quoted statement but defense counsel maintained his client's complete statement should be admitted because it explained his views of the entire situation and reflected the motive of the complaining witness's mother. The court noted that appellant claimed Stella was trying to get back at him because he and Joy kicked her out of their house. The court concluded that what Stella was doing at the bar on Belmont and Valentine Avenues was not relevant and granted the prosecutor's motion to strike that quoted portion of appellant's statement to Holguin.

Evidence Code section 354 states:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
>
> "(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
>
> "(b) The rulings of the court made compliance with subdivision (a) futile; or
>
> "(c) The evidence was sought by questions asked during cross-examination or recross-examination."

Evidence Code section 356 states:

> "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party ... and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

A trial court's determination of whether evidence is admissible under Evidence Code section 356 is reviewed for abuse of discretion. If a statement admitted in evidence

is part of a conversation, the opponent is entitled to have placed in evidence all that was said by or to the declaration in the course of the conversation, provided the other statements have some bearing on or connection with the statement in evidence. (*People v. Parrish* (2007) 152 Cal.App.4th 263, 274.)

In the instant case, appellant submits his statement about Stella's alleged involvement with drugs and prostitution would have corrected the "false impression" left by the portion introduced by the prosecution. In the prosecution's view, appellant believed Stella fabricated the story of molestation only because appellant had evicted her from the apartment. Appellant maintains:

> "A jury might or might not believe that a person would make up a story about sexual molestation simply as revenge for being evicted from temporary living quarters. However a jury would be more likely to believe that the story was concocted if they learned that the person was involved in criminal activity such as drug dealing and prostitution. It is a commonplace trait that criminals have little compunction about lying."

Although the trial court excluded appellant's statements about Stella allegedly engaging in prostitution and drug dealing, the court did allow the jury to consider other statements made by appellant to Officer Holguin. From those statements, the jury learned that Stella worked at a bar at Belmont and Valentine Avenues, that she worked on Friday, Saturday, and Sunday evenings until 2:00 a.m., that she was "drunker then a skunk" when she came home from that employment, that she had guys in her father's apartment when she returned home from work, and that one of those guys could have molested "I." Appellant also told Holguin he advised Stella what she needed to do to straighten up her life but "she wouldn't listen to me."

The omitted references to drug dealing and prostitution did not create a misimpression as the jury was well aware of appellant's repeated denials of molestation. Moreover, from appellant's frank description of Stella's employment and after-hours conduct, the jury could reasonably infer that she was engaged in questionable behavior

that could have exposed her daughter to danger at the hands of men who frequented her father's apartment at the King's Court complex. Finally, appellant ultimately admitted that he touched "I" twice, once on the inside of her underwear and once on the outside and these admissions were made known to the jury.

Given these facts and circumstances, it is not reasonably probable a result more favorable to appellant would have occurred had the trial court admitted his statements about Stella's alleged involvement in drug dealing and prostitution.

IV. DO APPELLANT'S PRIOR KANSAS CONVICTIONS FOR AGGRAVATED INCEST QUALIFY AS SERIOUS FELONIES UNDER SECTION 667?

In a lengthy supplemental opening brief, appellant contends his prior Kansas convictions do not qualify as "serious felonies" in California because the Kansas statute does not include all of the elements required for a serious felony under California law.

Appellant specifically contends the trial court erroneously applied the rule of *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*), which authorizes a trier of fact to consider the entire record of conviction when trying a prior conviction special allegation used to enhance a defendant's sentence. Appellant maintains recent U.S. Supreme Court cases (*Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, *Shepard v. United States* (2005) 544 U.S. 13) require trial courts to abandon *Guerrero* and apply the earlier rule of *People v. Alfaro* (1986) 42 Cal.3d 627, 634-636 (*Alfaro*) (evidence that can be used to prove a prior-conviction allegation is limited to the judgment and matters necessarily adjudicated therein).

In the first amended information, the People alleged appellant had sustained three prior strike convictions, a 1987 prior conviction of section 288, subdivision (a) and two 1992 Kansas convictions for aggravated incest (Kan. Stat. Ann.§ 21-3603(2)(b)). In a

bifurcated proceeding on January 31, 2008, the prosecution presented certified documents from Sedgwick County, Kansas to prove appellant's prior convictions for aggravated incest. One document, entitled "Complaint/Information," reflected the four charges against appellant and included the names and ages of the victims and the acts involved. A second document, entitled "Journal Entry of Judgment," reflected appellant's plea of guilty to the charged offenses.

At appellant's bifurcated hearing in this case, the court noted:

> "[T]hose counts, as they are set forth, are almost identical to the counts charged in this case, the 288(a); and, therefore, the Court will find at this time that the two counts alleged in aggravation from Kansas will be accepted and admitted into evidence and found to be true."

In *People v. Crowson* (1983) 33 Cal.3d 623, 633, the Supreme Court held a section 667.5 enhancement for a non-California felony is permissible only when the elements of the foreign crime, as defined by that jurisdiction's statutory or common law, include all of the elements of a California felony. In *People v. Myers* (1993) 5 Cal.4th 1193, 1995 (*Myers*), the Supreme Court held – notwithstanding *Crowson* – the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which the defendant was previously convicted involved conduct which satisfies all of the elements of the comparable California serious felony offense. In other words, the prosecution can go behind the statutory elements of the crime to prove that a defendant's actual crime constitutes a felony under California law. In *People v. Riel* (2000) 22 Cal.4th 1153, 1205, the Supreme Court concluded that *Guerrero* and *Myers* have implicitly overruled *Crowson* as to the consideration of whether a prior out-of-state felony qualifies as an enhancement under section 667.5, subdivision (b) and section 667.5, subdivision (f).

In the instant case, appellant argues that recent U.S. Supreme Court opinions suggest that the rule of *Guerrero* is no longer applicable and that California courts must apply the rule of *Alfaro*, which pre-dated *Guerrero* by two years. Appellant has not cited

and we have been unable to find any express California or U.S. Supreme Court case authority for this proposition. Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine makes no sense. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction, and it is not their function to attempt to overrule decisions of a higher court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant's challenge to *Guerrero* and its application in the instant case must be rejected.

V. DID THE TRIAL COURT VIOLATE APPELLANT'S FEDERAL RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE OF PRIOR ACTS TO SHOW PROPENSITY?

In his opening brief, appellant contends the trial court denied him due process when it admitted evidence to prove propensity to commit the charged offense and instructed the jury it could consider evidence of prior uncharged sexual offenses, pursuant to Judicial Council of California Criminal Jury Instructions (2007-2008), CALCRIM No. 1191.

In response, the People note the California Supreme Court has rejected this argument in *People v. Falsetta* (1999) 21 Cal.4th 903, 913-914 and that several appellate courts have rejected contentions identical to that of appellant (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 87; *People v. Cromp* (2007) 153 Cal.App.4th 476, 479-480).

In reply, appellant acknowledges this court is bound by stare decisis on this issue and maintains the issue is "sufficiently preserved" for further review by the California Supreme Court and by the federal courts.

No further discussion is required.

DISPOSITION

The judgment is affirmed.

_____
HILL, J.

WE CONCUR:

_____
DAWSON, Acting P.J.

_____
KANE, J.